

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
October 30, 2007 Session

STATE OF TENNESSEE v. LISA DURBIN HOWARD

**Appeal from the Criminal Court for Bradley County
No. M-03-669 Carroll L. Ross, Judge**

No. E2007-00178-CCA-R3-PC - Filed April 22, 2008

A jury found the Defendant, Lisa Durbin Howard, guilty of first degree premeditated murder, and the trial court sentenced her to life imprisonment. In this delayed appeal,¹ she presents seven issues for our consideration: (1) whether the evidence was sufficient to support her conviction; (2) whether comments made by the trial court to the jury as it deliberated were improper; (3) whether the trial court erred by disallowing expert testimony proffered by the Defendant regarding her experiences with domestic violence; (4) whether it was plain error for the trial court not to address the State's striking of the only African-American of the venire; (5) whether alleged juror misconduct deprived the Defendant of her right to a fair and impartial jury; (6) whether the trial court abused its discretion by not individually polling the jury; and (7) whether the State's failure to properly preserve the recordings of the preliminary examination, contrary to Tennessee Rule of Criminal Procedure 5.1(a), required the trial court to remand the case to the general sessions court. Following our review of the appellate record and the parties' briefs, we affirm the judgment of the trial court.

**Delayed Appeal Granted Pursuant to Tenn. Code Ann. § 40-30-113;
Judgment of the Criminal Court Affirmed**

DAVID H. WELLES, J., delivered the opinion of the court, in which DAVID G. HAYES and D. KELLY THOMAS, JR., JJ., joined.

Larry D. Wright, Assistant Public Defender, Cleveland, Tennessee, for the Appellant, Lisa Durbin Howard.

¹ The Defendant first appealed her case to this Court in 2005. See State v. Lisa Durbin Howard, No. E2005-00112-CCA-R3-CD, 2005 WL 2922364 (Tenn. Crim. App., Knoxville, Nov. 4, 2005), perm. to appeal denied, (Tenn. March 27, 2006). She waived her right to appellate review of the issues she presented on that occasion because she had not filed a timely motion for a new trial. See id. at *2. However, she filed a timely petition for post-conviction relief, and the post-conviction court ruled that her counsel was constitutionally ineffective for failing to properly move for a new trial. As a remedy, the post-conviction court granted her permission to pursue this delayed appeal.

Robert E. Cooper, Jr., Attorney General and Reporter; Renee W. Turner, Assistant Attorney General; Steven Bebb, District Attorney General; and John R. Bledsoe, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

Factual Background

The victim, Brian Howard, was shot and killed inside his home in Bradley County. Subsequently, a grand jury indicted the thirty-eight-year-old Defendant—the victim’s wife—for first degree premeditated murder. A jury trial followed.

At her trial, Lieutenant Terry Norwood of the Bradley County Sheriff’s Department testified that at approximately 10:00 p.m. on February 15, 2002, he responded to a 9-1-1 call at 701 Lowery Street in Cleveland. The mobile home situated directly behind the house at that address was actually the residence at which the victim and the Defendant lived and the location of the shooting. The house in front of their mobile home was the residence of the Defendant’s parents.

Two women were outside the mobile home when Lieutenant Norwood arrived, and they were “just hysterical and screaming.” One of the women was the Defendant, and as Lieutenant Norwood tried to calm her, she said, “I shot him.” The Defendant was then taken into custody. Lieutenant Norwood found the victim lying dead on a bedroom floor inside the mobile home, and he secured the scene before turning it over to detectives.

Senior Lieutenant Barry Tharp, the Director of Forensics for the Bradley County Sheriff’s Office, testified that he collected evidence at the crime scene. Inside the mobile home, Lieutenant Tharp saw no indication “that there had been a fight,” and because the home was “basically in order,” he focused on the bedroom in which the victim’s body was discovered.

In the bedroom, there was a loaded nine-millimeter handgun manufactured by Taurus setting on the top of the chest of drawers opposite the bed; it was housed inside a holster and secured by a strap. Another nine-millimeter pistol (a Beretta) was discovered on the bed. The Beretta was loaded and jammed: It had been fired, and the subsequent live cartridge did not feed properly into the firing chamber, holding it open and preventing the weapon from being fired again. Two shell casings from spent cartridges were also found in the bedroom; both had been fired in the Beretta. The victim, who lay face-down on the floor between the bed and the chest of drawers, had been shot once in the back and once in the chest.

Detective Bill Coultry testified that the police had been called to the Howards’ mobile home for a “domestic disturbance” once prior to the February 15, 2002 shooting. Sergeant Dennis Goins testified that on January 17, 2002, he was sent to the residence in response to a 9-1-1 call the Defendant placed regarding “an unwanted subject.” When he arrived, the Defendant was “irate” and

explained that she and the victim were divorcing² and in an argument. She demanded that the victim leave the residence. He was “cooperative” and “calm” while telling Sergeant Goins that he would leave if the Defendant returned a nine-millimeter handgun (the Beretta) that belonged to him but was in her possession. He eventually agreed to leave because the Defendant asserted that the pistol had recently been stolen. Although the Defendant complained to Sergeant Goins that the victim “had been violent to her,” no arrests were made because there were no signs of violence at the residence or on the Defendant’s person.

Joey Stevenson testified that he had known the Defendant since 1989 and that they had a “sort of on and off living together relationship” from 1992 until 1998. He remained “friends” with the Defendant after she married the victim; however, Stevenson and the victim “had problems” because the victim suspected that the Defendant was still “seeing” Stevenson. At one time, the victim challenged Stevenson to meet him at a public park, telling him that he was going to “fuck him up.” Stevenson had never seen the victim assault the Defendant, but he had seen the Defendant with a black eye she attributed to the victim.

On the evening of the shooting, the Defendant called Stevenson at approximately 7:30 p.m. from a hospital where she was visiting her father. The Defendant complained to Stevenson that the victim was not showing her any “sympathy or compassion.” At approximately 9:25 p.m. later that day, she called him again, and she was “just frantic.” He asked her why she was distraught, and she said, “I’ve shot him”—meaning the victim. Stevenson told her to call 9-1-1, but she was so “hysterical” that he called 9-1-1 himself.

Dr. Ronald Toolsie, the Bradley County Medical Examiner, testified as an expert in forensic pathology. He performed the victim’s autopsy. The victim had two bullet-entry wounds on his torso; one was on the upper-left-side of his back, and the other was on the left-side of his chest. He had no bullet exit wounds, so both bullets remained inside his body. Dr. Toolsie removed one bullet. The fatal wound was inflicted by the gunshot to the back: That bullet passed through his left lung and his aorta. Based on the manner of the victim’s internal bleeding, Dr. Toolsie opined that this wound was likely inflicted first, but he conceded that, if the bullets were fired in rapid succession, he could have been shot in either the back or the chest first. The victim also had an injury to the “bridge of his nose,” indicating that he had fallen face-forward; however, he did not have any typical “defensive or offensive types of injuries on his hands or forearms,” suggesting that he had not been in a physical altercation immediately prior to his death.

Special Agent Forensic Scientist Kelly Hopkins of the Tennessee Bureau of Investigation’s Nashville Crime Laboratory testified as a toxicological expert. She conducted a “basic drug screen” on a sample of the victim’s blood, and no trace of illegal narcotics was detected. Steve Scott, another Special Agent Forensic Scientist employed at the same laboratory, testified as an expert in firearms and ballistics. He confirmed that the bullet Dr. Toolsie removed from the victim’s body

² The parties stipulated that the victim had filed for divorce in August of 2001, and the “papers” were served on the Defendant.

was fired in the Beretta recovered from the crime scene. He also concluded that the gunshot to the victim's chest was inflicted from a distance between two and four feet away from the muzzle of the handgun. Similarly, he informed that the gunshot to the victim's back was inflicted from one to two feet away.

Bill Burt, who was the Captain of the Criminal Investigation Division of the Bradley County Sheriff's Department in February of 2002, testified that he took the Defendant's statement shortly after the crime scene had been secured. Captain Burt did not observe any injuries on the Defendant at that time, and when he asked if she had any injuries, she responded in the negative. The parties stipulated that she effectively waived her Miranda³ rights prior to giving the statement. A videotape of her statement was played for the jury.

In the statement, the Defendant explained that before the shooting, she and the victim had an altercation at a hospital where she was visiting her father, and the victim accused her of "talking to Joey [Stevenson]." She was upset and went home, and "maybe an hour" later, the victim also returned to their mobile home. Their argument continued. She stated that the victim called her foul names, pulled her hair and hit on her on the head as she sat on a couch. The Defendant demanded that the victim leave, and he asserted that he would not leave without a certain handgun (the Beretta) that was in the Defendant's possession. According to the Defendant, he also said "numerous" times that "if he ever left that house he would make sure [she] was dead before he left."

She then walked to her parents' house (which was the house directly in front of their mobile home) and retrieved the Beretta pistol. The Defendant explained that she returned to the mobile home, found the victim sitting on their bed, placed the Beretta pistol on the bed, then picked it up and shot him where he sat:

[Captain Burt]: So you walk out the door, okay, tell me what you did?

[Defendant]: I went to my parents house and got the gun and I brought it back down to the house, and I sat it on the bed.

[Captain Burt]: Okay, was he still in the bedroom?

[Defendant]: Yes.

[Captain Burt]: Okay, so go ahead, you sat the gun on the bed.

[Defendant]: I sat it down on the bed.

[Captain Burt]: Okay, keep going.

³ See Miranda v. Arizona, 384 U.S. 436, 479 (1966).

[Defendant]: And he was still talking his crap and he's like, you know I told you if I left again I would kill you, he told me that several times, and it scared me really bad and he jumped and he started to like jump up and he sat back down and I just grabbed it and I shot.

[Captain Burt]: And what happened? Tell me what happened after that. Did you shoot him one time or two times, so you remember?

[Defendant]: Twice.

[Captain Burt]: Okay, so what happened after the first time you shot him?

[Defendant]: He started coming at me.

[Captain Burt]: Okay, so after you shoot him a second time, then you go What's the next thing that you do? What did you do with the gun after you shot him?

[Defendant]: I left it on the bed.

[Captain Burt]: Okay, do you remember where you were standing when you shot him?

[Defendant]: Somewhere in the bedroom, just somewhere in the bedroom.

[Captain Burt]: Okay, so what's the first thing you did after you did that?

[Defendant]: I believe I called Joey [Stevenson].

[Captain Burt]: And what did you tell him?

[Defendant]: I don't know. I told him I needed help.

[Captain Burt]: Okay, did you ever call 9-1-1? Or did he call?

[Defendant]: He called.

The Defendant said that she was "scared" and "didn't mean to do it."

During her statement, she also said that the victim had hit her on the nose "on several occasions" and that he had given her black eyes in the past. According to her, once when she would not let him enter the mobile home, he kicked the door open and then "slammed" her face into a mirror. The last time he hit her was two weeks prior to the shooting.

Captain Burt confirmed that the only prior, reported domestic disturbance at the mobile home was the aforementioned January 17, 2002 dispute. Further, Captain Burt discovered that there was “nothing available as far as domestic violence or any type of abuse at any, any point in time” from two hospitals and a doctor that had treated the Defendant.

Rodney Ramey testified that the victim was his “best friend” and co-worker. He also knew the Defendant. Several times during the victim’s marriage to the Defendant, the victim would sleep at Ramey’s house because the Defendant would not allow him to stay at their mobile home. The victim was on medication for depression and anxiety.

Ramey witnessed altercations between the Defendant and the victim a “couple of times.” On those occasions, the Defendant would be “angry” and “aggressive.” She also left inflammatory and insulting voice mail messages on the victim’s cellular telephone. Ramey had never seen the victim be violent to the Defendant nor had he ever seen the Defendant with any injuries on her person. However, Ramey had seen the victim with injuries inflicted by the Defendant, including “scratches, a black eye, [and] a busted nose.” According to Ramey, the victim did not “act out or break things”; although, he was aware that on one occasion, when the victim learned that the Defendant’s ex-boyfriend (Joey Stevenson) was at their mobile home, he went there with a baseball bat, but “Joey was gone,” so he “took it out on the stove” Ramey also testified that the Defendant was not afraid of the victim.

The Defendant’s mother, Glenda Payne, testified that the Defendant and the victim lived in the mobile home behind her house. She witnessed physical altercations between the two, including an episode where the victim “was on top of” the Defendant and hitting her. According to Payne, the victim was “always jealous” because of the Defendant’s relationship with Joey Stevenson, and “every few weeks” they would “fuss[,]” and the victim would leave the house. The Defendant’s sister, Glynis Williams, testified that the victim was “fussing” at the Defendant at the hospital on the day of the shooting, and she was afraid they would be asked to leave because of his behavior.

Timothy Durbin testified that he was previously married to the Defendant, that they had a son and daughter together before they divorced, and that they divorced because he “beat the hell out of her one time.” Episodes of violence were common during their marriage. After the Defendant married the victim, Durbin maintained a friendly relationship with the victim, whom he had known for many years.

He also testified that the victim was concerned about the Defendant’s relationship with Joey Stevenson. In fact, the Saturday before the victim was killed, Durbin spoke with the victim on the telephone after the victim and the Defendant had been arguing. The victim told Durbin three times: “If I can’t have her, Joey [Stevenson] can’t have her. If I have to leave again, I’m going to kill her.” According to Durbin, the victim usually kept a nine-millimeter handgun in his car and would “wear it on his hip when he [came] into the house from work and he’d lay it on the counter.”

The Defendant testified that she was first married to the victim for a brief period approximately sixteen years before the trial and that their first marriage was annulled because of his “mental problems.” Then, she lived with Joey Stevenson, who was an abusive alcoholic. She remarried the victim in 2001.

At first, their second marriage was “wonderful,” but the victim’s “jealously” over her continued relationship with Stevenson intensified over time. According to the Defendant, after the victim had “his first heart attack,” he became physically violent and sexually aggressive. He would force her to perform sexual acts against her will, including wearing specific lingerie, under a black-light, while mimicking activity being portrayed on pornographic internet websites. The Defendant averred that on more than one occasion, the victim forced her to the ground, removed her dentures, and made her perform oral sex. She also claimed that he routinely masturbated while viewing pornography, even when her daughter was present in the mobile home. She further asserted that the victim would abuse her by performing an action he referred to as “Shamuing”: The victim, who was a large man, would knock her down and pin her to the floor by lying on top of her.

Periods of relative calm would follow his violent outbursts, but the intervals between aggressions grew shorter with time. To get away from him, she would “ask him to leave,” but she did not call the police to report these episodes of violence, nor would she leave their home. According to her, he would take all the possessions he purchased during the marriage with him when he left, and he often used his control over their finances to force her to take him back. She stated that the victim carried a handgun “at all times.”

The Defendant testified that after their altercation at the hospital on the night of the shooting, the victim arrived at the mobile home sometime after her and began “a lot of fussing.” She wanted him to leave, but he refused to go without the Beretta handgun. He “promised” he would leave if she returned the gun. She retrieved it from her parents’ house and returned to the mobile home to find the victim in their bedroom. He had removed the Taurus handgun from “the back of his pants” when he first got home and placed it on the dresser in their bedroom.

When she entered the room with the Beretta, he was sitting on the bed near the foot. She stood on the opposite side of the bed near the headboard. She told him she had retrieved the gun and that she wanted him to leave. According to the Defendant, while “glaring over his shoulder,” the victim responded that if he left, he would kill her first. Then, he “started” to get up quickly, and she shot him “out of fear for [her] life.” She testified that she “thought [she] missed” because he “kept coming” with his hand reached out for the holstered handgun on the dresser, so she “fired again.”

Rhonda Ownby, a rebuttal witness for the State, testified that the victim was her younger brother, and they were “very close.” Approximately two months prior to her brother’s death, she saw him with facial injuries and “scratches” that he attributed to the Defendant. That same day, she listened to voice mail messages left by the Defendant on the victim’s cellular telephone; she called “him every name in the book.” Ownby had never seen the victim be violent towards another person.

She described him as “easygoing.” According to Ownby, the victim never carried a gun on his person.

Ginger Rominger testified that she was the victim’s ex-wife. She dated the victim for two-and-one-half years and then was married to him for one-and-one-half years before he married the Defendant. Rominger and the victim had a daughter together and maintained an amicable relationship after they divorced in 1991. They had verbal disagreements during their four-year courtship and marriage, but the victim “never” hit her or otherwise physically abused her—even on one occasion when she attacked his face with a set of car keys. According to Rominger, the victim was “a gentle, loving, [and] kind man.” She never knew him to carry a gun on his person.

After deliberation, the jury found the Defendant guilty of first degree premeditated murder. The trial court immediately imposed a life sentence because the State did not seek a sentence of life without parole or the death penalty.⁴ The Defendant’s appeal is now properly before this Court.

Analysis

I. Sufficiency of the Evidence

On appeal, the Defendant argues that the evidence was not sufficient to support her conviction. Specifically, she asserts that the State did not satisfy its burden of proving her guilty of first degree premeditated murder beyond a reasonable doubt because the facts presented at her trial established that she lawfully shot the victim in self-defense. To support this argument, the Defendant relies principally on her trial testimony that, just before the shooting, the victim exclaimed his intent to kill the Defendant and reached for the holstered pistol on the dresser.

Tennessee Rule of Appellate Procedure 13(e) prescribes that “[f]indings of guilt in criminal actions whether by the trial court or jury shall be set aside if the evidence is insufficient to support the findings by the trier of fact of guilt beyond a reasonable doubt.” A convicted criminal defendant who challenges the sufficiency of the evidence on appeal bears the burden of demonstrating why the evidence is insufficient to support the verdict, because a verdict of guilt destroys the presumption of innocence and imposes a presumption of guilt. See State v. Evans, 108 S.W.3d 231, 237 (Tenn. 2003); State v. Carruthers, 35 S.W.3d 516, 557-58 (Tenn. 2000); State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982). This Court must reject a convicted criminal defendant’s challenge to the sufficiency of the evidence if, after considering the evidence in a light most favorable to the prosecution, we determine that any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. See Jackson v. Virginia, 443 U.S. 307, 319 (1979); State v. Hall, 8 S.W.3d 593, 599 (Tenn. 1999).

On appeal, the State is entitled to the strongest legitimate view of the evidence and all reasonable and legitimate inferences which may be drawn therefrom. See Carruthers, 35 S.W.3d at

⁴ Tennessee Code Annotated section 39-13-202(c) states: “A person convicted of first degree murder shall be punished by: (1) Death; (2) Imprisonment for life without the possibility of parole; or (3) Imprisonment for life.”

558; Hall, 8 S.W.3d at 599. A guilty verdict by the trier of fact accredits the testimony of the State's witnesses and resolves all conflicts in the evidence in favor of the prosecution's theory. See State v. Bland, 958 S.W.2d 651, 659 (Tenn. 1997). Questions about the credibility of witnesses, the weight and value of the evidence, as well as all factual issues raised by the evidence are resolved by the trier of fact, and this Court will not re-weigh or re-evaluate the evidence. See Evans, 108 S.W.3d at 236; Bland, 958 S.W.2d at 659. Nor will this Court substitute its own inferences drawn from circumstantial evidence for those drawn by the trier of fact. See Evans, 108 S.W.3d at 236-37; Carruthers, 35 S.W.3d at 557.

First degree murder, as relevant to this appeal, is defined as a premeditated and intentional killing of another. See Tenn. Code Ann. § 34-13-202(a)(1). The definition of first degree murder includes a subdivision on the meaning of "premeditation":

As used in subdivision (a)(1), "premeditation" is an act done after the exercise of reflection and judgment. "Premeditation" means that the intent to kill must have been formed prior to the act itself. It is not necessary that the purpose to kill pre-exist in the mind of the accused for any definite period of time. The mental state of the accused at the time the accused allegedly decided to kill must be carefully considered in order to determine whether the accused was sufficiently free from excitement and passion as to be capable of premeditation.

Tenn. Code Ann. § 39-13-202(d). Further, our supreme court has ruled that "[t]he element of premeditation is a question for the jury which may be established by proof of the circumstances surrounding the killing." State v. Young, 196 S.W.3d 85, 108 (Tenn. 2006) (citing State v. Bland, 958 S.W.2d 651, 660 (Tenn. 1997)); see also State v. Suttles, 30 S.W.3d 252, 261 (Tenn. 2000). Our high court has also identified some specific circumstances that support a finding of premeditation:

There are several factors which tend to support the existence of [premeditation and deliberation] which include: the use of a deadly weapon upon an unarmed victim; the particular cruelty of the killing; declarations by the defendant of an intent to kill; evidence of procurement of a weapon; preparations before the killing for concealment of the crime; and calmness immediately after the killing.

Bland, 958 S.W.2d at 660 (citing State v. West, 844 S.W.2d 144, 148 (Tenn. 1992)). A defendant's failure to render aid to a victim can also indicate the existence of premeditation. State v. Lewis, 36 S.W.3d 88, 96 (Tenn. Crim. App. 2000) (other citations omitted).

In the present case, the fact that the Defendant shot and killed the victim was never disputed. Consequently, to secure her conviction for first degree murder, the State had to prove beyond a reasonable doubt that she did so with the requisite intent and premeditation. We conclude that the State carried this burden.

Although the Defendant's sister testified that the Defendant and the victim were arguing at the hospital on the night of the shooting, other than the Defendant's testimony, no evidence was presented indicating that the Defendant and the victim were fighting at the moment she shot him. On the contrary, Senior Lieutenant Tharp testified that there was no indication of a struggle at the crime scene and that their home was "basically in order." Dr. Toolsie testified that the victim's body bore no typical signs of a fight. Captain Burt testified that the Defendant was likewise uninjured that night.

Moreover, based on the Defendant's statement and testimony provided by the State's witnesses, the jury could have reasonably concluded that the Defendant inflicted the fatal gunshot wound to the victim as he sat on the bed, one or two feet away, with his back to her. Viewed in a light most favorable to the State, this evidence would allow a reasonable juror to conclude that the Defendant was free from excitement and passion when she shot the victim, and therefore was capable of premeditation. See Tenn. Code Ann. § 39-13-202(d); Carruthers, 35 S.W.3d at 558; Hall, 8 S.W.3d at 599.

Additional evidence supported the jury's finding of premeditation. By the Defendant's own admission, before she shot the victim, she procured a deadly weapon by walking to her parents' house and retrieving the Beretta pistol. Also, as the other handgun in the room was sitting undisturbed on a dresser (holstered and secured by a strap), the jury could have reasonably concluded that the victim was unarmed when the Defendant shot him. In addition, her statement established that immediately after the killing, she called her ex-boyfriend, Joey Stevenson, and told him that she needed help. In order to alert emergency services to the situation, Stevenson had to hang up on her and call 9-1-1 himself. This evidence supports the view that she made no effort to render aid to the victim after she shot him. We conclude that in viewing these circumstances in a light most favorable to the State, a rational trier of fact could conclude beyond a reasonable doubt that the Defendant exercised reflection and judgment prior to killing the victim, and thus that the killing was intentional and premeditated. See Tenn. Code Ann. § 39-13-202(a), (d).

While the Defendant testified that the victim threatened to kill her, that he was often physically and sexually abusive, and that she shot him as he was reaching for the handgun on the dresser, the jury, by finding her guilty, did not accredit this testimony. "The jury was not obligated to accept the [Defendant's] testimony as to self-defense. The issue of self-defense in a murder prosecution is always a question of fact to be determined by the trier of fact." State v. Curtis Daniel Hart, No. W2006-01332-CCA-R3-CD, 2007 WL 2284815 (Tenn. Crim. App., Jackson, Jan. 28, 2008). Moreover, the evidence presented regarding the victim's abusive tendencies was counterbalanced by the State's rebuttal witnesses, who described the victim as "easygoing" and "gentle." This Court will not disturb the jury's credibility determinations on appeal. See Evans, 108 S.W.3d at 236; Bland, 958 S.W.2d at 659. This issue has no merit.

II. Dynamite Charge

The Defendant also avers that a new trial is warranted in this case because the trial court issued a "dynamite" charge to the jury as it deliberated and thus impermissibly encouraged them to

agree on a verdict. See Kersey v. State, 525 S.W.2d 139, 144 (Tenn. 1975) (proscribing any form of a “dynamite” charge or instruction to a deadlocked jury by a trial court that is “tantamount to a judicially mandated majority verdict”); see also State v. Bowers, 77 S.W.3d 776, 788 (Tenn. Crim. App. 2001).

The allegedly improper comments made by the trial court to the jury are not recorded in the transcript of the evidence or otherwise adequately preserved in the record on appeal. Consequently, the Defendant’s argument must fail because “[a]s the appellant, the [D]efendant has the burden to present this Court with a record which conveys ‘a fair, accurate and complete account of what transpired with respect to those issues that are the bases of appeal.’” State v. Thompson, 36 S.W.3d 102, 108 (Tenn. Crim. App. 2000) (quoting Tenn. R. App. P. 24(b)). Without a complete and proper record, this Court is precluded from considering the issue. Id. (citing State v. Gibson, 973 S.W.2d 231, 244 (Tenn. Crim. App. 1997)); see also State v. Ballard, 855 S.W.2d 557, 560–61 (Tenn. 1993) (when an appellate record does not contain “a transcript of the proceedings relevant to an issue presented for review, or portions of the record upon which the party relies, an appellate court is precluded from considering the issue”).

III. Expert Testimony

The Defendant contends that the trial court prevented her from challenging the “mens rea element” of first degree murder by excluding the testimony of Dr. David Solovey, an expert clinical psychologist proffered by the defense. The Defendant’s argument on this issue is divided into three subsections. In order to frame the issue for our analysis of each part of the Defendant’s argument, it is first necessary to summarize relevant events from the Defendant’s trial.

Also, we note that much of the discussion on this issue in the trial court focused on the “hearsay” considered by Dr. Solovey. We emphasize that Rules 702, 703, 704 and 705 of the Tennessee Rules of Evidence do not contain exceptions to the hearsay rule. See Tenn. R. Evid. 803. However, an expert witness may base his or her opinions, at least in part, on “facts” ascertained from statements which would be inadmissible hearsay. See Tenn. R. Evid. 703.

a. Objection and offer of proof

Following the testimony of the Defendant’s ex-husband, Timothy Durbin, and before the Defendant testified, the defense called Dr. Solovey. In the jury’s presence, he was tendered and accepted as an expert in clinical psychology without objection. His credentials established that he had expertise in psychology as it related to “domestic relations.”

After being accepted as an expert, Dr. Solovey testified that he had been retained by the defense to conduct a psychological evaluation of the Defendant. He summarized the facts and basis of his evaluation and the conclusions he drew therefrom in a detailed written report. This report was admitted into evidence and published to the jury along with his curriculum vitae. Dr. Solovey explained that, in addition to reviewing her psychiatric history along with “other items” listed in his

report,⁵ his evaluation included interviews with the Defendant's mother, sister and daughter, as well as Timothy Durbin and Joey Stevenson.

When asked what "particular questions" he was attempting to answer through his evaluation, Dr. Solovey testified as follows:

Well, specifically as proposed, the questions initially dealt with areas of competency and sanity, that is, did she comprehend the nature of the charges against her? Was she able to assist counsel? Also, was she suffering from a mental disease or defect that would render her unable to appreciate the nature and quality or wrongfulness of her acts. And there was a question about her ability to assist defense, and then if there were really relevant factors bearing on her character, her history, her psychological make-up, her psychological and mental history or psychological status that would impact. (emphasis added).

Next, Dr. Solovey was asked to give "a synopsis" of what he "determined with her social history as a result of [his] evaluation." He then produced another document he called a "break-down" of his full report (an abbreviated version comprised of a number of bullet points detailing the Defendant's social history, the tests and interviews he conducted, and his conclusions). At that point, the State objected and a bench conference was held when the "break-down" was offered into evidence; before that time, the State had not seen the "break-down" of Dr. Solovey's evaluation. The jury was excused⁶ while the trial court, the State, and defense counsel debated the admissibility of Dr. Solovey's proffered testimony.

At the outset, the trial court ruled the "break-down" inadmissible because it had not been disclosed to the State and was primarily composed of the Defendant's statements regarding her social history, especially the abuse she allegedly suffered at the hands of the victim. The trial court explained that its concern was that "if this was admissible, we would never have to have . . . a defendant testify again." The trial court further explained that it was concerned because none of the Defendant's extensive allegations in the report would be subject to cross-examination if he admitted it into evidence. Later, the trial court stated that Dr. Solovey's report appeared to be "a backdoor way of trying to get in evidence from [the Defendant] should she decide not to take the witness stand." The trial court granted defense counsel's request to make an offer of proof. Defense counsel then argued, as is set out below, that Dr. Solovey's testimony was admissible to show that the Defendant had a diminished capacity and a "social history" that affected her "mental state."

⁵ The "other items" to which Dr. Solovey referred were not specifically enumerated in the jury's presence. These items were the Wechsler Adult Intelligence Scale-III test, a Personality Assessment Inventory, the Minnesota Multiphasic Personality Inventory-2, and a "clinical interview" with the Defendant herself. The State noted, and the trial court acknowledged, that the clinical interview was conducted one year and eight months after the shooting.

⁶ Although it had been admitted into evidence, it appears from the transcript of the evidence that no jury member had an opportunity to examine Dr. Solovey's full report before they were excused from the courtroom.

The trial court eventually concluded that any information in Dr. Solovey's "break-down" and full report were not admissible because they were based on unreliable hearsay:

Well, you know, this is the kind of thing that, that regularly comes in at sentencing, but I've never had this in at a trial, this kind of—I mean, there's just—in looking at this report, it's just, it's replete with just all sorts of accusations against the [victim], allegation [sic] of the things he did to her . . . for which there's no proof in the record. And that would be allowing [Dr. Solovey] to interview [the Defendant] and then him be allowed to come in and testify and present her defense without anyone ever being able to cross-examine her. And that's my concern with this, the more I'm looking at this.

The trial court further concluded that Dr. Solovey's findings and opinions, standing alone, were also inadmissible because Dr. Solovey would have to reveal their basis to the jury in order to properly present them. Ultimately, the trial court ruled that Dr. Solovey's entire testimony was inadmissible.⁷ However, the trial court indicated that if his testimony had been offered to show that the Defendant was incompetent to stand trial, was insane, or had a "mental disease," then it would have been admitted.

When the jury was brought back into the courtroom, the trial court instructed the jury not to consider for any purpose the fact that Dr. Solovey was not going to testify any further. His report and curriculum vitae were removed from evidence, but they were made a part of the record on appeal.

b. Underlying facts and data

First, the Defendant argues that the trial court erred in ruling that "the information included in Dr. Solovey's report and his testimony was inadmissible hearsay." The Defendant asserts that because the "issue before the jury was self-defense," and because the trial court charged lesser included offenses, Dr. Solovey's testimony would have "plainly" assisted the jury in determining her state of mind at the time of the killing and in determining whether the State met its burden of proof on all the elements of first degree murder. Essentially, the Defendant avers that Dr. Solovey's testimony should have been admitted under Rules 702 and 703 of the Tennessee Rules of Evidence.

⁷ At one point during the discussion and offer of proof, defense counsel also explained that the victim's daily journal and past medical records from Hiwassee Mental Health Center comprised part of the basis of Dr. Solovey's conclusions. Therefrom, Dr. Solovey intended to testify that the victim was "obsessed and preoccupied . . . in his relationship . . . with the [Defendant]." The trial court stated that this part of Dr. Solovey's testimony was admissible and that the doctor could provide specific examples from the victim's journal and medical records (including the types of medications the victim was prescribed) to support his conclusions. However, later, the trial court decided that none of Dr. Solovey's testimony would be admitted.

In State v. Hall, 958 S.W.2d 679, 688–92 (Tenn. 1997), our supreme court addressed the admissibility of expert testimony of the type offered by the Defendant in this case and explained that it was admissible if it met certain, specific criteria:

[T]o gain admissibility, expert testimony regarding a [criminal] defendant’s incapacity to form the required mental state must satisfy the general relevancy standards as well as the evidentiary rules which specifically govern expert testimony. Assuming that those standards are satisfied, psychiatric evidence that the

Hall, 958 S.W.2d at 689. Pursuant to the Hall court’s explanation, expert opinion of this type must not only be admissible under the general evidentiary rules of relevancy and the rules specifically regarding admission of expert opinions, it must also satisfy a further standard. See id. Specifically, this type of psychiatric expert opinion must be offered to show that “the defendant lacks the capacity, because of mental disease or defect, to form the requisite culpable mental state to commit the offense charged” Id.

Accordingly, to be admitted, expert testimony must be relevant, and its probative value must not be substantially outweighed by its prejudicial effect. See Tenn. R. Evid. 401, 402, 403. It must also satisfy the requirements of Rule 702,⁸ meaning that in this context, “expert testimony regarding the defendant’s incapacity to form the required mental state must ‘substantially assist the trier of fact to understand the evidence or to determine a fact in issue.’” Hall, 958 S.W.2d at 689 (citing State v. Shuck, 953 S.W.2d 662 (Tenn. 1997)).

In addition, Rule 703 states as follows:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence. The court shall disallow testimony in the form of an opinion or inference if the underlying facts or data indicate lack of trustworthiness.

Tenn. R. Evid. 703 (emphasis added).

⁸ Rule 702 of the Tennessee Rules of Evidence states:

If scientific, technical, or other specialized knowledge will substantially assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise.

Under this rule, so long as the expert opinion is based on facts and data made known to the expert at or before trial, and is of a type normally relied on by that type of expert,⁹ the underlying factual basis of an expert opinion can be revealed even if other rules of evidence prohibit its admission. See id. Accordingly, as the Defendant argues, an expert's testimony may include hearsay, if the hearsay is a part of the basis of the expert's opinion and otherwise satisfies the first two sentences of Rule 703. See id.; see also State v. Lewis, 235 S.W.3d 136, 150–52 (Tenn. 2007). However, the admission of the basis of expert opinion is not a certainty under Rule 703 because it is within the trial court's discretion to "disallow testimony in the form of opinion or inference if the underlying facts or data indicate lack of trustworthiness." Tenn. R. Evid. 703; see also Lewis, 235 S.W.3d at 152 (indicating that when the opponent of proffered expert testimony contends that the underlying data is untrustworthy, it can be properly excluded under Rule 703).

In the present case, it appears from the transcript of trial proceedings the trial court ruled Dr. Solovey's testimony inadmissible because it considered the underlying facts and data (hearsay statements made by the Defendant and others) of his opinion to be untrustworthy. The admissibility of expert testimony, including the application of Rule 703, is a matter which largely rests "within the sound discretion of the trial court. Such discretion however, is not absolute and may be overturned on appeal where the discretion is arbitrarily exercised." Ballard, 855 S.W.2d at 562 (citing State v. Rhoden, 739 S.W.2d 6 (Tenn. Crim. App. 1987)) (other citation omitted).

In our view, Dr. Solovey's otherwise admissible expert psychological opinions of the Defendant's mental state would not be rendered inadmissible on the grounds that the opinions were based in part on statements made by the Defendant and others in the course of Dr. Solovey's examination and evaluation. Mental health experts commonly rely on such statements, many of which would not be admissible as evidence at trial because of hearsay or other evidentiary restrictions. We must conclude that disallowing the proffered evidence based on hearsay concerns was error. However, as we discuss next in this opinion, we conclude that the expert testimony did not meet the threshold for relevancy set forth in State v. Hall, 958 S.W.2d 679 (Tenn. 1997). Thus, the Defendant is not entitled to relief on this issue.

c. Removal of burden of proof on issue of mens rea

Next, the Defendant argues that the trial court's ruling excluding Dr. Solovey's testimony had the effect of preventing the defense from challenging the mens rea aspect of the State's case and therefore removed the burden of proof the State would otherwise have had to carry as to that element. In support of this argument, the Defendant cites to State v. Hall.

In Hall our supreme court agreed with an opinion of this Court, stating that to exclude admissible psychiatric, expert testimony would "deprive the [defendant] of the means to challenge an aspect of the prosecution's case and remove the burden of proof on that element in contravention

⁹ In this case, the State does not contend, and the trial court did not find, that the underlying facts and data of Dr. Solovey's report were not made known to him at or before the trial, or that they are not of the kind normally relied upon by experts in his field. Rather, the crux of the issue is whether the hearsay basis of his testimony was trustworthy.

of constitutional and statutory law.” Hall, 958 S.W.2d 689 (quoting State v. Phipps, 883 S.W.2d 138, 149 (Tenn. Crim. App. 1994)). However, there is no constitutional error if the psychiatric, expert testimony excluded is inadmissible for failure to comply with the specific requirements set out by our high court in Hall.

As stated earlier, even if expert psychiatric testimony tending to show a defendant did not possess the mens rea element of the crime charged satisfies the requirements of the rules of evidence, it must also meet the strict dictates of Hall. Specifically, this type of expert testimony must opine that “the defendant lacks the capacity, because of mental disease or defect, to form the requisite culpable mental state to commit the offense charged.” Hall, 958 S.W.2d at 689. In this case, Dr. Solovey’s testimony was not offered for that purpose. Rather, during the offer of proof, defense counsel argued that the testimony was admissible because

experts . . . can tender—rely on underlying facts and data that are normally delivered in the normal course of their type of expertise in their business. . . . This is what these type of individuals do. These doctors, these psychologists, they do this. I would respectfully proffer that this is admissible going to the mental state of the defendant, as to diminished capacity of the defendant, and that it would be admissible at any sentencing or mitigation.

In Hall, the supreme court specifically states that this type of evidence “should not be proffered as proof of ‘diminished capacity.’” Hall, 958 S.W.2d at 690 (explaining the history of diminished capacity evidence and why such evidence is not favored in Tennessee). Rather, expert testimony of this type should be offered “as relevant to negate the existence of the culpable mental state required to establish the criminal offense for which the defendant is being tried.” Id. (footnote omitted). This is not the purpose for which Dr. Solovey’s testimony was offered. Indeed, at a point later in the offer of proof, defense counsel further argued that the testimony was admissible for the following purpose:

Again, the underlying facts and data, your Honor, as, as to what—how [the Defendant] was raised, how that impacted her or her development, how that impacts her as far as her responses. It’s all within the purview of an expert that has come to the conclusion as to her mental state, not as to the issue of whether or not she was doing premeditated murder or whatever. That’s not what we’re offering him for.

Moreover, the conclusions stated in Dr. Solovey’s written report regarding the Defendant’s mental condition also support exclusion. These conclusions were offered in response to the following question: “Was [the Defendant] suffering from a severe mental disease or defect that rendered her unable to appreciate the nature and quality or the wrongfulness of her acts?” Based on his interviews, review of the Defendant’s medical history, and other tests, Dr. Solovey responded in his report as follows:

[The Defendant] had been under psychiatric care since she was an early teen. She has been prescribed an anti-psychotic, major tranquilizers, antidepressants, and anti anxiety medication since an early teen. It is clear from her background and symptom clusters that she carries an active diagnosis of [p]ost traumatic stress disorder and [m]ajor depression. Although her psychotic experiences are limited and not observed during this evaluation, the level of depression had occasionally reached a level significant enough to be psychotic. It is clear from her testing and personal history that she has the potential for these episodes. It was clear that she was under significant and enduring stress during the offense. Her father was gravely ill, her daughter was creating intense havoc, and the ongoing stress of the demands and abuse from her husband was very intense. The levels of stress, given her pathologies, could have easily contributed to her feeling very threatened and diminished her judgment and capability.

Our review of defense counsel's offer of proof and Dr. Solovey's report leads us to the conclusion that his testimony was not admissible under Hall because Dr. Solovey was not prepared to testify that, because of mental disease or defect, the Defendant lacked the capacity to form the premeditated intent to kill her husband. The Hall court was very deliberate in explaining that expert psychiatric testimony of this type must be offered to show that the defendant was unable to form the mental state enumerated in the charged offense because of a mental disease or defect:

[W]e emphasize that the psychiatric testimony must demonstrate that the defendant's inability to form the requisite culpable mental state was the product of a mental disease or defect, not just a particular emotional state or mental condition. It is the showing of a lack of capacity to form the requisite culpable mental intent that is central to evaluating the admissibility of expert psychiatric testimony.

Id. (emphasis in original); see also State v. Faulkner, 154 S.W.3d 48, 55–56 (Tenn. 2005) (finding that expert psychiatric testimony that the first degree murder defendant's social history, which included abusive parents, cocaine addiction, and a number of "stressors," caused his "predisposition towards impulsive behavior" to be significantly worse, did not meet the Hall requirements); State v. Maraschiello, 88 S.W.3d 586, 608–10 (Tenn. Crim. App. 2000) (concluding that expert testimony regarding the general characteristics of "Gulf War Syndrome" was not admissible under the Hall requirements). Accordingly, we conclude that the Defendant is not entitled to relief based on the trial court's exclusion of Dr. Solovey's testimony.

IV. Excusal of Only African-American Venireperson

The Defendant argues that it was error for the trial court to allow the State to exercise a peremptory challenge striking the only black member of the jury pool (Martha Williams) without requiring the State to explain why it did so. The State argues that the Defendant waived review of this issue because she failed to object when Ms. Williams was excused. The Defendant concedes that no timely objection was made, but she argues that defense counsel did not know until after the jury had been selected that Ms. Williams was the only black venireperson. Specifically, the

Defendant avers that “it was near impossible to tell, during the heat of trial and jury selection, who was there for the jury pool and who was there for other things.”

Initially, we note that the transcript of the jury selection process from the Defendant’s trial is at odds with the Defendant’s assertion that defense counsel would not have known that Ms. Williams was the only black member of the jury pool. Before Ms. Williams was excused from the jury pool, the trial court, along with the State and the defense, individually questioned each venireperson (including Ms. Williams) regarding their knowledge of media attention paid to the Defendant’s case. In order to do so, the trial court had the entire jury pool step out of the courtroom and then called each member of the jury pool, one by one, back into the courtroom for questioning. Accordingly, it would have been evident to defense counsel that Ms. Williams was the only black venireperson. Additionally, the twelve members of the Defendant’s jury had been selected prior to the excusal of Ms. Williams; she was struck during the selection of alternates.¹⁰

Ms. Williams was questioned three times during the voir dire process. Initially, when a general question was asked of the venire regarding reservations potential jurors might have about being selected, Ms. Williams expressed concern about serving on the jury because she had just started a new job and was the only wage earner in her household. She was informed that she would be paid by her employer while serving on the jury and was not excused at that time. The second time Ms. Williams was specifically addressed was when she was called in to answer questions about her knowledge of media attention paid to the Defendant’s case. In their final exchange during the selection of alternates, she was questioned by both the State and defense counsel about her reservations with serving on the jury due to the training she would miss at her new job. After this last exchange, the trial court asked the attorneys to submit their “strike forms.” Then, the trial court announced, “Ms. Williams, you have been excused. You are free to go. We appreciate your being here.” Accordingly, although both parties seem to agree on appeal that it was the State who struck Ms. Williams, it is not clear from the record whether the defense or the State used a peremptory challenge to strike Ms. Williams.

Nonetheless, we agree with the State that because the Defendant failed to make any objection regarding the excusal of Ms. Williams until her motion for a new trial, this issue was waived for purposes of appellate review. State v. Peck, 719 S.W.2d 553, 555 (Tenn. Crim. App. 1986) (“After a party has assured the court that the jury as impaneled is acceptable, that party will not be heard to complain of the makeup of the jury panel.” (citing Tenn. R. App. P. 36(a))); see also State v. Christopher Knighton, No. E2000-00746-CCA-R3, 2001 WL 125952, at *5 (Tenn. Crim. App., Knoxville, Feb. 15, 2001); State v. Clint Elmore, No. 03C01-9711-CR-00514, 1998 WL 573407, at *4–5 (Tenn. Crim. App., Knoxville, Sept. 9, 1998) (concluding that the defense was not entitled to relief on its Batson claim, in part, because it “failed to raise its objections in time to allow the court to cure any alleged discrimination”). In order for a defendant to challenge the State’s striking of a venireperson on racial grounds and gain relief under the United States Supreme Court’s decision in Batson v. Kentucky, 476 U.S. 79 (1986), the defendant must make out a prima facie case of

¹⁰ The trial court seated four alternates; Ms. Williams was struck prior to the selection of the first alternate.

discrimination at an appropriate time. See State v. Hugueley, 185 S.W.3d 356, 368–69 (Tenn. 2006) (detailing the procedure of lodging a Batson objection during voir dire). This issue is without merit.

V. Alleged Juror Misconduct During Voir Dire

Next, the Defendant argues that juror misconduct undermined the integrity of the jury and “thus deprived [her] of her right to a fair and impartial jury.” She avers specifically that the individual who ultimately served as the foreman of her jury, Mr. Roger Christian, “may have misrepresented his criminal past, or at least failed to state, when questioned during voir dire, that he was involved in some type of domestic violence himself.” In the alternative, the Defendant argues that it was an abuse of discretion for the trial court to disallow testimony by Mr. Christian’s wife and son at her motion for a new trial.

Similar to Ms. Williams, Mr. Christian had the opportunity to respond to general questions asked of the venire as a whole, and he was addressed directly multiple times during voir dire. When Mr. Christian was individually questioned by the parties and the trial court as to whether he was aware of media reports regarding the Defendant’s case, he responded that he had no knowledge of any media reports.

Later in voir dire, the State directed general questions about domestic violence to the venire. Early in the process, the State asked the venire whether anyone had been the victim of a crime which had involved an investigation by law enforcement personnel. Several members of the venire responded, including Mr. Christian. Specifically, he informed that he “was wrongly arrested on the front porch with a concealed weapon, which [he] had a permit for.” As a result, Mr. Christian complained that he had “spent the night in jail” before the case was dropped and the incident “expunged from [his] record.” Upon further questioning, he assured the State that this experience would not affect his ability to be impartial if he served on the jury.

Later, among other topics, the State asked whether any member of the venire had been or closely knew someone who had been a victim of domestic violence. Further, the State inquired whether anyone believed “a woman cannot be the abuser” in a domestic violence situation. Defense counsel also inquired of the venire whether any of them had been the victim of domestic violence. Only one member of the jury pool had any response to these questions; it was not Mr. Christian. Defense counsel also asked whether any of the venire were unable to recognize that domestic violence often takes place “in secret.” There were no responses to this question, but shortly thereafter, defense counsel singled out Mr. Christian, and they had the following exchange:

[Defense counsel]: . . . Mr. Christian?

[Mr. Christian]: Yes, sir.

[Defense counsel]: I noted that you had indicated that you had been arrested wrongly at some point. To follow up on that, would that situation or that experience you had with the police close your

mind to the idea that sometimes police make mistakes, or would it open your mind?

[Mr. Christian]: Open my mind that they do sometimes make mistakes.

Finally, before Mr. Christian was selected as a member of the Defendant's jury, the trial court called him "to the front row" and asked him whether he "had a response to anything that [he had] not already responded to." He did not, and as earlier stated, he went on to become the foreman of the Defendant's jury.

In support of the allegation that Mr. Christian did not fully disclose his personal experiences with domestic violence during voir dire, the Defendant submitted an arrest warrant at her motion for a new trial showing that Mr. Christian had been charged with aggravated domestic assault on April 18, 2004—approximately two months after the Defendant's conviction. The warrant alleged that Mr. Christian had struck his wife, pointed a handgun at her and their son, and fled from the police. Based on this event, defense counsel suspected that Mr. Christian had been engaged in some manner of domestic violence prior to the Defendant's trial. In order to prove this contingency, defense counsel had subpoenaed Mr. Christian, his wife, and his son to testify at the Defendant's motion for a new trial.

Based on the exchange between defense counsel and Mr. Christian during voir dire, the trial court concluded that defense counsel had intentionally selected Mr. Christian as a member of the jury, and as a result, the trial court would not allow any of the Christians to testify at the motion for a new trial and denied the Defendant relief as to this issue. Specifically, the trial court ruled that none of them could testify "[b]ecause it's clear to me that you wanted him on the jury, based on what you said to him, because he had been arrested and charged with domestic violence."¹¹ The trial court further ruled that Mr. Christian's history would not be explored based on the questions counsel ask during voir dire. In essence, the trial court reasoned that because defense counsel clearly wanted Mr. Christian on the jury, the Defendant was not entitled to relief due to Mr. Christian's alleged prejudices.

a. Fair and impartial jury

Initially, we will address the Defendant's contention that Mr. Christian did not fully disclose his experiences with domestic violence during voir dire, and therefore her right to an impartial jury, as guaranteed by Article I, section nine of the Tennessee Constitution and the Sixth Amendment to the Constitution of the United States of America was violated. Specifically, the Defendant asserts that because Mr. Christian was arrested for aggravated domestic assault on April 18, 2004, he was more likely than not also involved with domestic violence prior to her trial, and therefore he was untruthful during voir dire by not responding to relevant questions.

¹¹ We note that the only arrest Mr. Christian spoke of during voir dire was his arrest related to a "concealed weapon."

The State asserts on appeal that the Defendant has waived this argument because she did not make any objections during her trial regarding any of the jurors. We disagree: When a defendant argues that a juror concealed or misrepresented information during voir dire that tends to indicate a lack of impartiality, the challenge may be made in a motion for new trial. State v. Akins, 867 S.W.2d 350, 355 (Tenn. Crim. App. 1993) (parsing the difference between “propter defectum” and “propter affectum” challenges to a juror’s impartiality).

This Court has stressed in previous opinions that “[t]he jury selection process must be carefully guarded to ensure that each defendant has a fair trial and that the verdict is determined by an impartial trier of fact.” Id. at 354; see also Toombs v. State, 270 S.W.2d 649, 650 (Tenn. 1954). During voir dire, lawyers intend to ask questions that permit them to exercise their limited number of challenges in an intelligent fashion. It is through this process that a fair and impartial jury is to be impaneled. Akins, 867 S.W.2d at 354 (citing 47 Am. Jur. 2d Jury § 195 (1969)). Accordingly, voir dire is very important, and its integrity must be zealously guarded. Id. at 355 (citing numerous Tennessee opinions from each of our appellate courts expressing this sentiment).

However, the voir dire process is only effective when potential jurors are open and honest in responding to the questions of counsel, and “[w]hen a juror willfully conceals (or fails to disclose) information on voir dire which reflects on the juror’s lack of impartiality, a presumption of prejudice arises.” Id. (citing Durham v. State, 188 S.W.2d 555, 559 (Tenn. 1945)). In other words, when a juror is not forthcoming in response to questions which are “reasonably calculated to produce an answer, [their] silence is tantamount to a negative answer.” Id. (citing 47 Am. Jur. 2d Jury § 208 (1969)). Consequently, when a juror does not respond to specific questions that bear on their own relevant life experiences, the right to an impartial jury is jeopardized. See id. at 354–58 (reasoning that because an individual who served as the foreman of the defendant’s jury did not respond to questions during voir dire about her relevant experiences with law enforcement and alcohol abuse—the defendant’s right to an impartial jury was violated and a new trial was necessary).

When a juror’s impartiality is brought into question, the defendant “bears the burden of providing a prima facie case of bias or partiality.” Id. at 355 (citing State v. Taylor, 669 S.W.2d 694, 700 (Tenn. Crim. App. 1983)); see also State v. Jeanie Marie Seals, No. E2006-01878-CCA-R3-CD, 2008 WL 95601, at *24 (Tenn. Crim. App., Knoxville, Jan. 8, 2008) (stating that when a juror is not “legally disqualified or there is no inherent prejudice, the burden is on the defendant to show that a juror is in some way biased or prejudiced” (quoting State v. Caughron, 855 S.W.2d 526, 539 (Tenn. 1993))). In order to establish a violation of the right to an impartial jury, “[j]uror bias must be shown, not just suspected.” State v. Lawson, 794 S.W.2d 363, 367 (Tenn. Crim. App. 1990) (citing Smith v. Phillips, 455 U.S. 209 (1982)).

At the Defendant’s motion for a new trial, the trial court ruled that Mr. Christian’s arrest more than two months after the Defendant’s conviction had “no bearing whatsoever” on the Defendant’s trial. We agree. We conclude that the trial court did not abuse its discretion by not allowing the Defendant to further pursue this issue at the motion for a new trial.

b. Abuse of discretion

In a closely related argument, the Defendant contends that it was an abuse of discretion for the trial court to disallow testimony at her motion for a new trial offered to establish that Mr. Christian was involved in domestic violence before the Defendant's trial. As explained above, defense counsel had subpoenaed Mr. Christian, his wife, and his son to testify at the Defendant's motion for a new trial, and they were present and ready to testify. However, the trial court did not allow their testimony to be presented.

The trial court did request that defense counsel submit a written offer of proof regarding the testimony that Mr. Christian's wife and son would have presented. In the written offer of proof—which did not affect the trial court's ruling—the Defendant avers generally that “their testimony would show a long history of domestic violence perpetrated by [Mr. Christian], and hence, his lack of truthfulness during voir dire.” No affidavits were included in the offer of proof.

Defense counsel's unsupported assertion that their testimony would have revealed Mr. Christian's “long history of domestic violence” is not sufficient for this Court to find an abuse of discretion by the trial court. Without specific averments tending to show that Mr. Christian was untruthful during voir dire when asked about his experiences with domestic violence, we cannot conclude that it was error for the trial court to disallow the testimony at issue.

VI. Polling of the Jury

The Defendant further asserts that it was error for the trial court to poll the jury by requesting a show of hands rather than individually questioning each juror to assure that the verdict was unanimous.

As the jury deliberated, defense counsel made an oral motion to have the jury polled after it returned a verdict. The trial court responded that it always conducted a jury poll by asking “for a show of hands to make sure it's unanimous.” Defense counsel then affirmed that this manner of polling was acceptable. At the close of the trial, just after the jury returned the verdict, the trial court polled the jury as follows: “[The foreman] has read a guilty verdict of first degree murder. If that's the unanimous verdict of each and every member of the jury panel, would you so indicate by raising your right hand? And for the record, I do see 12 hands raised.” No objection was made regarding the manner of the trial court's poll.

The State contends that the Defendant has waived any argument regarding the manner in which the jury was polled because defense counsel agreed to the “show of hands” method prior to the poll and because no objection was made to the poll itself. We agree. See *Tenn. R. App. P. 36(a)* (“Nothing in this rule shall be construed as requiring relief be granted to a party responsible for an error or who failed to take whatever action was reasonably available to prevent or nullify the harmful effect of an error.”); see generally *State v. Kirby Stephens*, No. M2006-02521-CCA-R3-CD, 2007 WL 2744999, at *15–16 (Tenn. Crim. App., Nashville, Sept. 21, 2007) (concluding that the defendant waived his argument regarding the method in which the trial court polled the jury because he failed to request that the jury be polled or lodge any timely objection) (citing *Rice v. State*, 475

S.W.2d 178, 180 (Tenn. Crim. App. 1971) (other citations omitted).¹² This issue has no merit.

VII. Preliminary examination recordings

Finally, the Defendant contends that the trial court erred in refusing to grant her pretrial motion to dismiss and have her case set for a new preliminary hearing because the State failed to preserve an electronic recording (or its equivalent) of her preliminary hearing as required by Tennessee Rule of Criminal Procedure 5.1(a). In her pretrial motion and at her motion for a new trial, she asserted that under our supreme court's holding in State v. Graves, 126 S.W.3d 873, 877–78 (Tenn. 2003), the State's failure to comply with the dictates of Rule 5.1(a) required a mandatory dismissal of her indictment. The State concedes that the electronic recording requirements of Rule 5.1(a) were not observed because the audiotape recording that was made of the hearing was “garbled”; however, the State maintains that the rule's violation was harmless error in the Defendant's case. The Defendant counters that under Graves, the failure to comply with Rule 5.1(a) is not subject to harmless error analysis.

Although a preliminary hearing is not constitutionally required in criminal cases, it is a critical stage of a criminal prosecution. See Moore v. State, 578 S.W.2d 78, 80 (Tenn. 1979); Waugh v. State, 564 S.W.2d 654, 659 (Tenn. 1978)); see also State v. Willoughby, 594 S.W.2d 388, 390 (Tenn. 1980) (citing McKeldin v. State, 516 S.W.2d 82 (Tenn. 1974)). The primary purpose of a preliminary hearing is to determine whether there is probable cause to believe that a defendant committed the charged offense and fix the amount of bail required where appropriate and permissible. See Willoughby, 594 S.W.2d at 390 (citing Tenn. R. Crim. P. 5.1; State v. D'Anna, 506 S.W.2d 200, 203 (Tenn. Crim. App.1973)). Put another way, its purpose is to determine whether a defendant should be bound over to the grand jury and “whether there is evidence sufficient to justify the continued detention of the defendant.” Id. (quoting Waugh, 564 S.W.2d at 659).

As our supreme court has observed, Tennessee courts have not held that a preliminary hearing is a discovery device. Id. Rather, discovery is “an important byproduct of its probable cause function.” Id. (quoting the comment to Rule 5.1). Preliminary hearings embody discovery aspects simply because they are not final hearings, and therefore “every question asked on cross-examination by either side, and every witness called and examined by either side, results in discovery.” Id. To that end, the “purpose of Rule 5.1(a) is to notify and make available to a defendant or defense counsel the evidence introduced at the preliminary hearing by preserving an ‘electronic recording or its equivalent.’” Graves, 126 S.W.3d at 876 (quoting Tenn. R. Crim. P. 5.1(a) (2005)).

Tennessee Rule of Criminal Procedure 5.1(a)—as it read before and during the Defendant's trial, as well as at her motion for a new trial—is set out in its entirety as follows:

¹² We note however Tennessee Rules of Criminal Procedure Rule 31(e)—as amended after the Defendant's conviction—indicates that trial courts must individually poll each juror after the return of a verdict in a criminal trial. See Tenn. R. Crim. P. 31(e) (2006) (“After a verdict is returned but before the verdict is recorded, the court shall—on a party's request or on the court's own initiative—poll the jurors individually.”) (emphasis added).

Probable Cause Finding. — If from the evidence it appears that an offense has been committed and that there is probable cause to believe that the defendant committed it, the magistrate shall forthwith bind the defendant over to the grand jury and either release the defendant pursuant to applicable law or commit the defendant to jail by written order. The finding that an offense has been committed and that there is probable cause to believe that the defendant committed it shall be based upon evidence which may not be inadmissible hearsay except documentary proof of ownership and written reports of expert witnesses. The defendant may cross-examine witnesses against him or her and may introduce evidence. Rules excluding evidence from consideration by the magistrate on the ground that it was acquired by unlawful means are applicable. The evidence of the witnesses is not required to be reduced to writing by the magistrate, or under the magistrate's direction, and signed by the respective witnesses; but the proceedings shall be preserved by electronic recording or its equivalent and when the defendant is subsequently indicted such recording shall be made available for listening to by the defendant or defendant's counsel to the end that they may be apprised of the evidence introduced upon the preliminary examination.

Tenn. R. Crim. P. 5.1(a) (2005).¹³

Previously, the failure of the State to make available to a defendant following indictment an electronic recording or its equivalent of the preliminary hearing was reviewed by this Court through harmless error analysis in consideration of the evidence establishing a defendant's guilt. See e.g., State v. Carter, 970 S.W.2d 509, 512 (Tenn. Crim. App. 1997); State v. Bohahan, 745 S.W.2d 892, 896 (Tenn. Crim. App. 1987); State v. McBee, 644 S.W.2d 425, 427 (Tenn. Crim. App. 1982) (stating that “[a]n examination of the record and appellant’s brief fails to establish any prejudice to the defense, or demonstrate how the [reenactment] of the preliminary hearing could have aided the defense in the subsequent trial,” and therefore concluding that the failure to adhere to the recording requirements of Rule 5.1(a) was harmless error); State v. Butts, 640 S.W.2d 37, 38 (Tenn. Crim. App. 1982); State v. Robert C. Copas, No. M1999-00841-CCA-R3-CD, 2000 WL 1336686, at *1 (Tenn. Crim. App., Nashville, Sept. 15, 2000) (noting that the issue of a failure to comply with the recording requirements of rule 5.1(a) is usually addressed in the post-trial context, and that this Court applied a harmless error analysis in those circumstances); see also Tenn. R. Crim. P. 52(a) (instructing that “[n]o judgment of conviction shall be reversed on appeal except for errors which

¹³ We note that Rule 5.1 of the Tennessee Rules of Criminal Procedure recently underwent several substantial amendments, including the addition of the requirement that a defendant's motion for dismissal and a new preliminary hearing, due to the fact that the audio recording of the original preliminary hearing is substantially inaudible, must be made within sixty days of arraignment. See Tenn. R. Crim. P. 5.1(a)(3) (2008). The State argued below and continues to argue on appeal that the Defendant should not be afforded relief on this issue because the Defendant waited until over two years after the preliminary hearing (two days before her scheduled trial date) to request the audiotapes of the preliminary hearing. Indeed, her motion to dismiss the indictment based on the inaudibility of the tapes was made the day before trial. However, there was no requirement under Rule 5.1(a) as it read before her trial that the motion be brought within any specific time following the preliminary hearing.

affirmatively appear to have affected the result of the trial on the merits”). However, in State v. Graves, our supreme court departed from this approach—specifically instructing that “the proper analysis should not simply focus on whether a violation of the rule was harmless error based on the degree of the evidence of guilt.” Graves, 126 S.W.3d at 878; but see id. at 878–79 (Holder, J., concurring) (opining that the “non-constitutional harmless error standard” should be applied when a violation of rule 5.1(a) is presented on appeal).

The Graves majority explained however that “automatic dismissal of the indictment is not required” in cases where the recording requirements of Rule 5.1(a) are unobserved. Id. at 877. Rather, the “critical issue must be whether the defense has been apprised of the evidence introduced at the preliminary hearing by receiving the same information as an ‘electronic recording or its equivalent.’” Id. (quoting Tenn. R. Crim. P. 5.1(a) (2005)).

Accordingly, the Graves court held that a trial court must dismiss an indictment and remand for a new preliminary hearing when a violation of the recording requirement of Rule 5.1(a) is brought to its attention prior to trial, unless a two-part standard is satisfied:

The State’s failure to preserve an electronic recording or its equivalent of a preliminary hearing under Rule 5.1(a) therefore requires the dismissal of the indictment and a remand for a new preliminary hearing, unless the State establishes (1) that all material and substantial evidence that was introduced at the preliminary hearing was made available to the defendant and (2) that the testimony made available to the defendant was subject to cross-examination.

Id. at 877–78 (citing State v. Bolden, 979 S.W.2d 587, 590 (Tenn. 1998)) (footnote omitted) (emphasis in original). When this standard is satisfied, a trial court’s denial of a motion to dismiss an indictment and remand for a new preliminary hearing based on a violation of Rule 5.1(a) is not error. Id. at 878 (“Given the evidence made available to the defendant in this case, the trial court did not err in refusing to dismiss the indictment based on a violation of Rule 5.1(a) of the Tennessee Rules of Criminal Procedure.”)

As such, the Defendant is correct that under Graves, this issue cannot be ultimately resolved by this court simply focusing on “whether a violation of the rule was harmless error based on the degree of the evidence of guilt.” Id. However, because we conclude that the standard enunciated in Graves was met in this case, the trial court’s ruling denying the Defendant’s motion to dismiss her indictment and remand for a new preliminary hearing was not error. In the Defendant’s case, as in the Graves case, the same information presented at the preliminary hearing was made available to the Defendant prior to trial.

It appears from the record that Captain Burtt was the only witness who testified at the Defendant’s preliminary hearing. At the hearing, Captain Burtt testified to the findings and opinions of Dr. Toolsie based on the doctor’s autopsy report. See Tenn. R. Crim. P. 5.1(a) (specifically providing that the probable cause determination at a preliminary hearing may be based on “written

reports of expert witnesses”). Captain Burt also testified to the physical location of evidence recovered inside the victim’s bedroom, such as the spent brass casings, and he was asked questions about his investigation of the case and the statement he took from the Defendant on the night of the shooting. The Defendant’s trial counsel represented her at the preliminary hearing.

As noted by the trial court, Captain Burt’s preliminary hearing testimony regarding Dr. Toolsie’s autopsy report would not have provided the Defendant with anything usable at trial because Captain Burt would be barred by evidentiary rules excluding hearsay from testifying at trial about the contents of the report. Further, because the Defendant possessed Dr. Toolsie’s autopsy report prior to trial, the Defendant received “the same information” regarding Captain Burt’s testimony on that issue during discovery. Graves, 126 S.W.3d at 878. It is evident from the record that the Defendant was thoroughly prepared to rebut Dr. Toolsie’s findings because the Defendant put on her own medical expert who critiqued the autopsy report at length.

Similarly, the Defendant could not have benefitted from any testimony Captain Burt provided at the preliminary hearing regarding the physical location of evidence at the crime scene because the State maintained an open-file discovery policy, which made numerous photographs of the crime scene available to the Defendant prior to trial. Likewise, any use the Defendant might have had for Captain Burt’s preliminary examination testimony regarding the Defendant’s statement was made moot because the videotape of the statement and a transcript thereof was made available to the Defendant.

Unlike Graves, where eyewitnesses testified for the State at the preliminary hearing to establish probable cause, in the Defendant’s case—as noted by the trial court—the probable cause determination was made based primarily on physical evidence and the findings in Dr. Toolsie’s autopsy report. The Defendant’s statement also provided a basis for the probable cause determination. Accordingly, the Graves requirement that the transcribed testimony provided to a defendant during discovery be subjected to cross-examination is not applicable in the present case because no such testimony was presented at her preliminary hearing.

We conclude that the trial court properly denied the motion to dismiss the indictment based on the State’s failure to preserve a recording of the preliminary hearing. This issue has no merit.

Conclusion

Based on the foregoing authorities and reasoning, we affirm the judgment of the trial court.

DAVID H. WELLES, JUDGE